

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 907 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and

MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed
to see the judgements? No

2. To be referred to the Reporter or not? No

3. Whether Their Lordships wish to see the fair copy
of the judgement? No

4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge?
No

STATE OF GUJARAT

Versus

BHURIYA @ KANAIYALAL DALPATRAM

Appearance:

MR DP JOSHI, APP for the State-appellant

MR YS LAKHANI, for the respondent.

CORAM : MR.JUSTICE J.M.PANCHAL and
MR.JUSTICE M.H.KADRI

Date of decision: 10/05/99

ORAL JUDGEMENT

(Per : Panchal, J.)

The acquittal of the respondent of the offence
punishable under section 20 of the Narcotic Drugs and
Psychotropic Substances Act, 1985 recorded by the learned
Additional Sessions Judge, Rajkot vide judgment and order

dated July 30, 1992 rendered in Sessions Case No. 49/91, is subject matter of challenge by the State of Gujarat in the present appeal, which is filed under section 378 of the Code of Criminal Procedure, 1973.

2. Mr. G.H.Sarvaiya, who was discharging duties as P.S.I., D.C.B., received an information on January 16, 1991 from Unarmed Police Constable Jagubha Nathubha that the respondent was in possession of charas and was selling the same near Virani High School, R.K.Chowk from Maruti Car bearing registration No. GCJ-207. On receipt of the said information, Mr. Sarvaiya took down the information in writing under sub-section (1) of Section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the N.D.P.S. Act" for short) and sent a copy thereof to Deputy Commissioner of Police, Rajkot who was his superior official. Mr. Sarvaiya thereafter summoned two witnesses at D.C.B. Office requiring them to act as panchas and prepared first part of the panchnama. Thereafter he left the Office in the company of panchas and other police personnel to the place where the respondent was allegedly selling charas. Mr. Sarvaiya had also carried with him weighing scales. When Mr. Sarvaiya reached near Virani High School at about 23.30 hours, he spotted white coloured Maruti Car and therefore, after disclosing his identity, interrogated the respondent who was sitting in the driver's seat. Mr. Sarvaiya informed the respondent that he had right to be searched in presence of a gazetted officer or nearest Magistrate, but the respondent permitted Mr. Sarvaiya to be searched. The search of person of the respondent in presence of panchas resulted into recovery of a plastic bag containing small pieces of black coloured substance as well as 21 small plastic bags containing black coloured substance. The substance found was identified to be charas on seeing and smelling. The respondent was called upon to produce pass or permit authorising him to possess charas, but the respondent could not produce any document authorising him to possess charas. Charas found weighed 160 grams. Charas found was placed in polyethene bag which was in turn placed in a card board box. The said box was tied with twine and after placing slip containing signatures of panch witnesses, seal of "Police Sub Inspector, LCB, Madhy Saurasthra, Rajkot District" was applied on it. 21 empty polyethene small bags were also placed in another card board box and was sealed as mentioned above. The respondent was arrested on January 17, 1991 at about 1.30 A.M. Thereafter second part of panchnama was completed and rojkam was prepared in which signature of the respondent was also obtained. Mr. Sarvaiya prepared a forwarding letter and sent sealed

articles to the Officer incharge of 'C' Division Police Station with the respondent through police constable Mr. D.R.Pandit. The officer incharge of 'C' Division Police Station recorded F.I.R. of Mr. Sarvaiya and after applying his seal on the samples, sent the samples to Mr. Sarvaiya so as to enable him to send the samples to Forensic Science Laboratory for analysis. Mr. Sarvaiya sent seized articles for analysis to Forensic Science Laboratory. The report received from Forensic Science Laboratory indicated that the substance sent and analysed was charas. On completion of the investigation, the respondent was chargesheeted for the offence punishable under section 20 of the N.D.P.S. Act. As the offence punishable under section 20 of the N.D.P.S. Act is exclusively triable by Special Court, the case was committed to District Court, Rajkot for trial. The learned Additional Sessions Judge, Rajkot to whom case was made over for trial, framed charge against the respondent at Exh.1 for the offence punishable under section 20 of the N.D.P.S. Act. The charge was read over and explained to the respondent who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Mansukhbhai Amarsinhbhai Kanani, P.W.1 at Exh.6, (2) Harisinh Premjibhai, P.W.2 at Exh.9, (3) Vijendraprasad Rajaram Pandit, PW.3 at Exh.10, (4) Somabhai Lakhabhai, PW.4 at Exh.11, and (5) G.H.Sarvaiya, PW.5 at Exh.15. The prosecution also produced documentary evidence, such as, panchnama of search of person of the respondent at Exh.7, the report prepared by Officer incharge of 'C' Division Police Station, Rajkot after production of the respondent before him and articles seized at Exh.12, report made by Mr. G.H.Sarvaiya, P.S.I. D.C.B., Rajkot City to officer incharge of 'C' Division Police Station, Rajkot at Exh.13, report made by the officer incharge of 'C' Division Police Station, Rajkot City to P.S.I. D.C.B. Branch, Rajkot city at Exh.14, complaint filed by Mr. G.H.Sarvaiya at Exh.16, information taken down in writing by Mr. Sarvaiya under section 42(1) of the Act at Exh.18, report made to the immediate superior official at Exh.20, report received from Forensic Science Laboratory at Exh.24 etc. in order to bring home guilt to the respondent. After recording of evidence of prosecution witnesses was over, learned Additional Sessions Judge questioned the respondent generally on the case and recorded his statement under section 313 of the Code of Criminal Procedure, 1973. In his further statement, the respondent denied the case of prosecution. However, no evidence in defence was led by the respondent.

3. On appreciation of evidence, learned Judge held

that it was not proved by the prosecution that the respondent was found in possession of charas on January 16, 1991 contrary to the provisions of the N.D.P.S. Act and, therefore, learned Judge acquitted the respondent by the impugned judgment, giving rise to present appeal.

4. Mr. D.P. Joshi, learned Counsel for the appellant submitted that recovery of charas from the respondent is amply proved by the evidence of investigating officer as well as other police officials who were present at the time when person of the respondent was searched and as the respondent had no pass or permit authorising him to possess charas, the respondent ought to have been convicted of the offence punishable under section 20 of the N.D.P.S. Act. The learned Counsel emphasised that the panch witnesses do not exercise power of vitto and merely because they had turned hostile, case of recovery of charas from the respondent on January 16, 1991 should not have been disbelieved by the learned Judge. What was claimed was that the provisions of sections 42, 50, 55 of the N.D.P.S. Act were complied with by the investigating officer and as the respondent was found in possession of charas contrary to the provisions of N.D.P.S. Act, the appeal should be allowed.

5. Mr. Y.S. Lakhani, learned Counsel for the respondent submitted that it is not proved by the prosecution that the same substance which was seized from the respondent was sent for analysis to Forensic Science Laboratory and, therefore, well-founded acquittal should not be disturbed by the Court in the present appeal. It was stressed that in view of major discrepancies as are evident from the contents of panchnama and report of F.S.L., acquittal appeal filed by the State Government should be dismissed. What was pleaded on behalf of the respondent was that in view of the discrepancies between the contents of panchnama and the report of F.S.L., learned Judge was justified in seeking corroboration to the evidence of police officials examined in the case and as police officials are not corroborated by evidence of independent panch witnesses, acquittal of the respondent should be confirmed by the Court.

6. We have been taken through the entire evidence on record by the learned Counsel for the parties. It is true that merely because panch witnesses have turned hostile, that fact by itself cannot be made basis for disbelieving the case of prosecution, if evidence of police officials examined in the case is otherwise found to be reliable. From the evidence of Mr. Sarvaiya, who had arranged the raid and other police officials, it

becomes evident that it is the case of prosecution that on January 16, 1991, search of person of the respondent resulted into recovery of 160 grams of charas contrary to the provisions of N.D.P.S.Act. In the panchnama which is on the record of the case at Exh.7, it is specifically mentioned that on search of person of the respondent being made, a plastic bag in which there were small black coloured pieces as well as 21 small polyethene bags containing black coloured substance were found and after emptying the bags, the substance found was ascertained to be charas on seeing and smelling. It is further mentioned in the panchnama that the substance found was weighed with the help of weighing scales and its weight was 160 grams. The evidence of Mr. Sarvaiya read with the evidence of other police officials makes it clear that charas which was found was placed in polyethene bag, which was in turn placed in a box of card board and the said box was thereafter sealed. The evidence on record also shows that empty small polyethene bags from which black coloured substance was found, were also kept in a box of card board and the said box was also sealed in presence of panchas. It is the specific case of the prosecution that the articles sealed were sent to F.S.L for analysis. However, the report of F.S.L. which is on the record of the case at Exh.24, indicates that only one packet of card board box was received by the Laboratory. The packet contained a blue coloured plastic bag and the plastic bag contained 25 pieces of brownish black resinous materials, weight of which was 72.247 kilograms as well as two small transperent plastic bags marked 'A' and 'B' containing small granulated blackish brown particles said to be charas weighing 44.037 and 20.602 respectively. The packet also contained a paper slip below the seal bearing signatures of (1) Mansukhbhai Amarshibhai, (2) H.P.Dodia in presence of P.S.I. D.C.B. Rajkot. The prosecution has not offered any explanation as to why weight of 25 pieces of brownish black resinous material is mentioned to be 72.247 Kilograms in the report of analyst. Even if it is assumed for the sake of argument that there was some mistake and the weight should be read as 72.247 Miligrams, the prosecution has not explained as to how two small transperent plastic bags marked 'A' & 'B' containing small granulated blackish brown particles said to be charas weighing 44.037 and 20.602 respectively were found in the packet. It is not the case of the prosecution that card board box contained plastic bag in which there were 25 pieces of brownish black resinous material as well as two small transperent plastic bags marked A & B containing small granulated blackish brown particles. It is also not mentioned in the panchnama that in the card board box,

plastic bag containing 25 pieces of brownish black resinous material and two small transparent plastic bags marked A & B containing small granulated blackish brown particles, were placed and sealed. Moreover, the total weight of charas received by the analyst roughly comes to 136.886 grams and not 160 grams as claimed by the prosecution. Under the circumstances, we are of the opinion that the prosecution has failed to prove satisfactorily that the same substance which was seized from the respondent was sent to the Forensic Science Laboratory for analysis. Having regard to the facts and circumstances of the case, we are of the view that the learned Judge was justified in seeking corroboration to the evidence of police officials. It is relevant to notice that both the panchas examined in the case have not supported the prosecution case regarding recovery of charas from the respondent on January 16, 1991. We may state that panchnama which is contemporary record of things heard and seen by the panchas, is quite contrary to the contents of report of the Forensic Science Laboratory. The learned Judge was, therefore, justified in giving benefit of doubt to the respondent.

7. This is an acquittal appeal in which court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of learned Judge who had opportunity to observe demeanour of the witnesses. As we are in general agreement with the view expressed by the learned Judge, we do not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the learned Judge and in our view, expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the case. This is so, in view of the decisions rendered by the Supreme Court in the cases of (1) Girija Nandini Devi & Ors. v. Bijendra Narain Chaudhary, A.I.R. 1967 S.C. 1124, and (2) State of Karnataka v. Hema Reddy and another, A.I.R. 1981 S.C. 1417. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondent. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondent. The learned Additional Public Prosecutor has failed to convince us to take the view contrary to the

one already taken by the learned Judge and therefore, the appeal is liable to be rejected.

For the foregoing reasons, we do not see any merits in the appeal. The appeal, therefore, fails and is dismissed. Muddamal articles to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

(patel)